

FREDDOLIN UJOE

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v.

BIGRAISE INANAM SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU

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RAVINTHRAN PARAMAGURU J

[CASE NO: BKI-24-20-1-2013]

13 MAY 2013

LAND LAW: *Easement - Right of way - Portion of appellant's land required for development project by respondent - Director of Lands and Surveys affirmed decision of Assistant Collector of Lands Revenue of Kota Kinabalu in granting respondent right of way over appellant's land - Appeal against - Whether respondent's land was landlocked as there was existing road providing access to land - Existence of official government reserve from nearest public road to respondent's land - Whether Director of Lands and Surveys could have granted right or ordered respondent to obtain State Government's permission to utilise*

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The present appeal arose from the decision of the Director of Lands and Surveys ('DLS') in affirming the decision of the Assistant Collector of Lands Revenue of Kota Kinabalu ('ACLR') granting the respondent's application for a right of way over the appellant's land. The appellant was the owner of a piece of 2.6 acre land ('the land') which was bisected by Jalan Bantayan-Minintod. The respondent owned two parcels of country lease lands located behind the bigger portion of the appellant's land. To the right of the appellant's land were two parcels of country lease lands owned by Avenue Partners Sdn Bhd ('Avenue'). The respondent intended to develop their land by building apartments and proceeded to apply for right of way from Jalan Bantayan-Minintod through the appellant's land into the land owned by Avenue. The ACLR granted the respondent's application but did not give any reason for his decision. The appellant appealed against the ACLR's decision to the DDLS but the appeal was dismissed. Hence, the present appeal. The appellant submitted that (i) the respondent's land was not landlocked as there was an existing road providing access to the respondent's land (Jalan Pengasaan) and the DLS did not give any reason for his decision why this road could not be used; and (ii) there was an official government road reserve from the nearest public road to the

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- A respondent's land upon which the DLS could have granted the right of way or ordered the respondent to obtain the State Government's permission to utilise.

Held (allowing appeal with costs):

- B (1) It was not fair for the respondent to argue that the lands were landlocked and had no access to Jalan Bantayan-Minintod. By virtue of the principle of dedication, a right of way would come into existence even before the respondent purchased their lands. The right of way claimed by the
- C respondent into their land on the appellant's land was the shortest and most practical route. It is practical for the respondent because it will pass through a small parcel of land that belongs to Avenue, which is related to the respondent. Jalan Pengasaan is only 13 feet wide and the respondent
- D required a 66 feet wide road to obtain planning approval. (para 18)

- (2) There was no merit in the appellant's argument that the DLS should not have granted right of way because of the existence
- E of a road reserve. The road reserve had not been developed as a road by the authorities and it only exists on paper. A road reserve which is not ready cannot be considered as an alternative route. (paras 13 & 14)

F Case(s) referred to:

Che Nik Bakar v. Pentadbir Tanah, Kuala Krai [1997] 5 CLJ 93 HC (**refd**)
Lye Thean Soo & Ors v. Sykt Warsaw [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160 SC (**refd**)

Sabah Forest Industries Sdn Bhd v. Mazlan Ali [2012] 10 CLJ 761 HC (**refd**)
Shim Vui Geh v. IJM Plantations Bhd (S-25-06-2010) (Unreported) HC

G (refd)

Si Rusa Inn Sdn Bhd & Ors v. The Collector Of Land Revenue, Port Dickson & Ors [1986] 1 CLJ 584; [1986] CLJ (Rep) 673 HC (**refd**)

Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor [2001] 4 CLJ 498 CA (**refd**)

H Legislation referred to:

Land Rules, r. 11(3)

National Land Code, s. 390(3)

Sabah Land Ordinance (Cap. 68), s. 31(d)

- I For the plaintiff - *Thomas Ting (Cindy Han with him); M/s Ng & Ting Advocs*
For the defendant - *Hassan Murtaza; M/s Shelley Yap Advocs*

Reported by Najib Tamby

JUDGMENT

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Ravinthran Paramaguru J:

Introduction

[1] This is an appeal from the decision of the Director of Lands and Surveys in respect of the application of the respondent for grant of a right of way over the appellant's land. The Director of Lands and Surveys affirmed the decision of the Assistant Collector of Land Revenue ("ACLR") of Kota Kinabalu who granted the application. For sake of clarification, I must point out at the outset that the Deputy Director of Lands and Surveys heard the appeal from the decision of the ACLR. However, he was exercising the powers of the Director of Lands and Surveys. I shall therefore refer to the Deputy Director of Lands and Surveys as the Director of Lands and Surveys.

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Brief Background Facts

[2] The appellant is the owner of a rectangular parcel of land (NT 6057) along Jalan Bantayan-Minintod. The size of the land is 2.6 acres. This land is already bisected into two halves by Jalan Bantayan-Minintod. The bigger portion of the rectangular land is on the left side of the road if one faces Inanam Town. It is about 1.6 acres. The respondent owns two parcels of country lease located behind the bigger portion of the appellant's land, ie, CL01568014 and PL016103094. To the right (if one faces Jalan Bantayan-Minintod) of the appellant's land are two parcels of country lease land (CL015126486 and CL013123314) that is owned by Avenue Partners Sdn Bhd. It is not disputed that the respondent intends to develop their land by building apartments. It is also not disputed that one of the directors and shareholders of respondent company ie, Ng Thian Su @ George Thien Chu, is also a director and shareholder of Avenue Partners Sdn Bhd.

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[3] The respondent applied for right of way from Jalan Bantayan-Minintod through the appellant's land (NT 6057) and into CL015126486 and CL013123314 which is owned by Avenue Partners Sdn Bhd. Avenue Partners Sdn Bhd had not objected to this application and had entered into an agreement with the respondent. The width of the access road that the respondent applied for was 20 metres (66 feet). Counsel for respondent explained helpfully during the hearing that such a wide swath of

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A road is necessary because it is the requirement under the law for residential development of the land. The right of way applied for by the respondent was along the right side of the appellant's land (if one faces the Bantayan-Minintod Road).

[4] The ACLR granted the application of the respondent for right of way through the appellant's land. However, he did not give any reasons for his decision. The appellant appealed to the Director of Lands and Surveys. The Director of Lands and Surveys dismissed the appeal and gave the following reasons:

1. That the existing village road which passes through the appellant's land, respondent's land and also Avenue Partners's land cannot be considered as an access road because it is not registered on the titles of the above lands. (However, the Director of Land and Surveys recognized it is being used by the villagers).

2. That the road reserve has not been excised from the lands it passes through and cannot be used yet. Furthermore permission from the government for road reserve under section 5 had not been obtained.

3. The right of way applied for by the respondent does not cut the land of the appellant into two.

[5] The appellant has appealed against the decision of the Director of Lands and Surveys. His main grounds of appeal are as follows:

(i) the Respondent's land is not land-locked as there is an existing road providing access to the Respondent's lands (Jalan Pengasaan) and the DDLS did not give any reasons for his decision why this existing road cannot be used;

(ii) there is an official government road reserve from the nearest public road i.e. Jalan Bantayan-Minintod to the Respondent's lands upon which the DDLS could have granted the right of way or ordered the Respondent to obtain the state government's permission to utilize for the purpose of a right of way; and

(iii) the DDLS erred in law and in fact in his exercising his discretion.

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Right Of Way

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[6] Although under common law, land owners are entitled to exclusive enjoyment of their property under the common law principle of inviolateness of land, this principle has to be considered in the light of statutory provisions under the Torrens or modified Torrens system. In *Che Nik Bakar v. Pentadbir Tanah, Kuala Krai* [1997] 5 CLJ 93; [1997] 5 MLJ 516, Nik Hashim J said as follows in overruling an argument based on this principle:

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The appellant defended her objection to the public right of way based on the principle of inviolateness of land. However, I am of the view that since s. 390(3) of the Code allows for the creation of public right of way on private land, that principle must be considered in the light of the doctrine of *salus populi suprema lex* – the interests of the public are paramount, and that private interests may in some circumstances be subordinated to the higher interests of the public, when the State thinks it is proper to do so.

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[7] Similarly, the Sabah Land Ordinance (Cap. 68) imposes some limitations on the right of the landowner to exclusive enjoyment of his land. Section 31(d) of the Ordinance provides for any owner of land can apply for a right of way through private land to a public road or river or foreshore. Section 31(d) of the Ordinance reads as follows:

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Every title shall, by virtue of this Ordinance, be subject, in the absence of an express provision to the contrary, to the following implied conditions in respect of the land contained therein:

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(d) any owner of alienated land, whether his title be of date prior or subsequent to the commencement of this Ordinance, may apply to the Collector of the district in which his land is situate for a right way from his and over any other alienated land to the nearest public road or a river or river or foreshore, or for permission to construct a drain or irrigation channel across such land, and the Collector shall deal with the application in the manner prescribed.

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[8] However, a landowner cannot apply for right of way willy-nilly through his neighbour's land for sake of his own convenience as that would amount to gross interference with the property right of another. The applicant must provide a very good reason for the application. In *Si Rusa Inn Sdn Bhd & Ors v. The Collector Of Land Revenue, Port Dickson & Ors* [1986] 1 CLJ 584; [1986] CLJ (Rep)

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A 673; [1987] 1 MLJ 147, the court considered the meaning of the word “expedient” as the s. 390(3) of the National Land Code provides as follows:

B (3) The Collector, if on holding an enquiry or making an investigation he is satisfied that it is expedient for a private or public right of way to be created, shall make an order creating the right of way. (emphasis added)

C [9] In spite of the use of the word “expedient”, the Peh Swee Chin J held that it does not give a blanket authority to grant a right of way. His Lordship said as follows:

D Next, was it reasonable in the circumstances to grant the private right of way? In *Liew Peck Lian’s* case, it was held that “reasonably” did not mean “conveniently.” With respect I agree, for were it otherwise, the floodgates would definitely be opened for similar applications in future; possibly made with complete abandon. There must be something more than just mere inconvenience or convenience; some situation that partakes of gravity or urgent necessity. Further there were no exceptional circumstances here which could have impelled the said Collector to make the order complained of, or which made it, for the said Collector, expedient to make an order which would be contrary to principle, the main one being the inviolateness of land in this case. Looking at the said Collector, it is difficult also to imagine a less urgent necessity or situation than that before the said Collector. It is neither desirable nor easy to specify such urgent or grave situations. I feel I ought to give an example at least. It is conceivable that in the old days when agricultural land was subdivided, no provision was ever made for surrender of portions of land for road reserve for access to a public road from land-locked interior lots, with the result that should the owners of lots with frontage to such public road decide to seal up their borders or boundaries, some occupiers would be completely denied any access at all to such public road. There is thus an urgent necessity, or a grave situation which would make it expedient for a Collector to grant a right of way against those favourably-placed landowners, against the principle of inviolateness of land.

H [10] In the Sabah case of *Shim Vui Geh v. IJM Plantations Bhd* (S-25-06-2010) (Unreported), Lee Heng Cheong JC said as follows after considering the above mentioned authority:

I Under the Sabah Land Ordinance, the purpose for a right of way to be granted is to provide a right of way from the landlocked land to “the nearest public road or a river or foreshore”. I agree

with the contention of the Appellant that the ACLR does not have the power to grant a right of way over other people's lands against the principle of inviolateness of land merely to grant a more convenient or cheaper access to the Respondent in the present case. A

[11] The power for the collector to hear and grant a right of way under the Sabah Land Ordinance is stated in r. 11(3) of the Land Rules (G.N. 505 of 1930) which reads as follows: B

If after hearing the case the Collector is satisfied that the application is reasonable, he may cause such a right of way or drain to be marked out and the applicant shall be entitled to construct and maintain such way or drain and thereafter use the same in the same manner and to the same extent as if it were a public road or drain, and the owner of such other alienated land shall not obstruct him C

[12] The test is that the application must be "reasonable". It is clear from the *Sri Rusa* case that reasonably does not mean "conveniently". In the instant case, the respondent's case is that their land is landlocked. Their counsel also submitted that the access to the Jalan Bantayan-Minintod is necessary for the development of his client's land. Counsel for appellant, on the other hand, argued that the right of way in question should not have been granted for the following reasons: D

1. the Respondent's land is not land-locked as there is an existing road providing access to the Respondent's lands and the Director of Land and Surveys did not give any reasons for his decision why this existing road cannot be used; F

2. there is an official government road reserve from the nearest public road i.e. Jalan Bantayan-Minintod to the Respondent's lands upon which the Director of Land and Surveys could have granted the right of way or ordered the Respondent to obtain the state government's permission to utilize for the purpose of a right of way; and G

3. the Director of Land and Surveys erred in law and in fact in his exercising his discretion. H

Decision

[13] I shall first consider the second ground of appeal, ie, that there is a road reserve that runs through the respondent's land and some third parties' lands and connects to the main road. Counsel for appellant submitted that the Director of Lands and I

- A Surveys should not have granted right of way because of the existence of this road reserve. In my view there is no merit in this ground as the road reserve has not been developed as a road by the authorities. It only exists on paper. As observed in *Lye Thean Soo & Ors v. Sykt Warsaw* [1990] 2 CLJ 743; [1990] 1 CLJ (Rep) 160; [1990] 3 MLJ 369 by Lee Hun Hoe CJ:
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Until the “reserve” is taken over by the appropriate authority it is only a road for some future use. Without the consent of the owner, a person using the road would be a trespasser.

- C [14] In *Che Nik Bakar v. Pentadbir Tanah, Kuala Krai*, (*supra*) as well, Nik Hashim JC noted that a road reserve which is not ready cannot be considered as an alternative route:

- D The so-called reserved road, and probably the same road referred to by Awang bin Da as ‘jalan lencongan ke Lot 864’, is not yet a road in the sense that it is practical and readily available for use by the public. It is still a jungle, sloppy and hilly. It is therefore not reasonable, in my view, to treat the road reserve as an alternative route to the road.

- E [15] Therefore the second ground of appeal is not valid as it remains a road reserve on paper only.

- F [16] I shall now consider the first ground of appeal. The respondent’s case was that their land is landlocked and that this is the reason they are applying for right of way. However, a closer look at the uncontroverted evidence tells a different story. Firstly, the appellant deposed unchallenged affidavit evidence to the effect that there is an existing village road (Jalan Pengasaan) that runs through the left boundary of the appellant’s land (if one faces Jalan Bantayan-Minintod) towards Kampung Pengasaan. This road also provides access to the respondent’s land. The appellant deposed affidavit evidence that this road has been used by the villagers for well over 15 years. It was also not challenged that when the respondent purchased their land, this road was already in use by the villagers. The director noted in his grounds of decision that this village road was currently used by the villagers to access Jalan Bantayan-Minintod. Apparently, the only reason the Director of Lands and Surveys did not consider that this road provided access to the respondent’s land is that because the village road was not registered on the titles of the landowners which included the appellant, the respondent and some third parties. In doing so, in my opinion he fell into error in ignoring the principle of dedication
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which can also create a right of way. In the Supreme Court case of *Lye Thean Soo & Ors v. Syarikat Warsaw (supra)* Lee Hun Hoe CJ (Borneo) made the following points in a case concerning the creation of a right of way other than by way of statute:

- (1) Apart from legislation, dedication is also a method by which a right of way may be created. A
 - (2) In this case the path has been used by the public, particularly those living in the vicinity for many years, even before the third appellant acquired ownership of the land, without interruption. He had taken no steps to ensure that a public right of way was not so created. The path has been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land. B
 - (3) The respondents were merely using the common law method of establishing a public right of way by proof of dedication. The learned judge was within his right to accept it and there is no reason to interfere with his decision. C
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[17] In the Sabah case of *Sabah Forest Industries Sdn Bhd v. Mazlan Ali* [2012] 10 CLJ 761, David Wong J cited the case of *Lye Thean Soo & Ors v. Syarikat Warsaw (supra)* and *Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor* [2001] 4 CLJ 498 in giving recognition to an unregistered right of way. In *Wangsa Timber Industries Sdn Bhd & Ors v. Adulfast Anthony Robert & Anor (supra)*, the Court of Appeal held that the Sabah Land Ordinance does not bar the reception of English common law principles in appropriate circumstances: E

For the above reasons, we are in agreement with the submission of the learned counsel for the respondents that the Sabah Land Ordinance (Cap. 68), being a modified Torrens system, is not an exhaustive, complete and comprehensive set of land laws in Sabah. It is clear to us that the Ordinance does not exclude the reception in appropriate circumstances the English common law, such as easement of right of way without it being registered. We are of the view that the learned judge came to the right conclusion when he decided that the respondents have acquired easement of right of way in respect of the access road even though it was not registered. F

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[18] As I said, the Director of Lands and Surveys accepted the contention of the appellant that the villagers had been using the village road known as Jalan Pengasaan on the left boundary (if one I

- A faces Jalan Bantayan-Minintod) of the appellant's land as the access road. In the premises, by virtue of the principle of dedication, a right of way had come into existence even before the respondent purchased their lands. Therefore, it is not fair to argue that the respondent's lands were landlocked and had no access to
- B Jalan Bantayan-Minintod. I am also fully aware that the right of way claimed by the respondent into their land on the right side of the appellant's land is the shortest and most practical route. It is practical for the respondent because it will pass through a small parcel of land that belongs to the Avenue Partners Sdn Bhd. As
- C I said earlier it is not disputed that Avenue Partners Sdn Bhd and the respondent are related companies. However, convenience is not a ground to disturb or infringe the property right of the appellant. To borrow the words of Peh Swee Chin J in *Si Rusa Inn Sdn Bhd & Ors v. The Collector Of Land Revenue, Port Dickson & Ors* (*supra*), there must be some "situation that partakes of gravity or urgent necessity". The argument advanced by the respondent that their land is landlocked for reasons given above, unfounded. It has also been submitted that the village road (Jalan Pengasaan) is only 13 feet wide and that the respondent requires
- E a 66 feet wide road to obtain planning approval. If this was the only reason, the respondent may well have applied for right of way on the existing Jalan Pengasaan. Otherwise, the appellant herein would face a situation whereby both his left and right boundaries have been taken for use as right of way.

- F [19] For all the above reasons, I shall allow this appeal with costs of RM5,000.

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